Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

GEERD GUENTHER, PETITIONER

v.

TIDEWATER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner sued under the Louisiana Whistleblower's Act, R.S. 23:967 for events which occurred outside of Louisiana in India, West Africa, or Dubai. The Act has no extra territorial application. Defendant moved to dismiss for lack of extraterritorial jurisdiction and on summary judgment grounds. The district court granted the motion for summary judgment and dismissed with prejudice. The Court of Appeals for the Fifth Circuit affirmed.

Was it error for the Court to reach the summary judgment and dismiss with prejudice?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals insofar as review of its judgment is sought.

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The decision of the Court of Appeals was not published. It is reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 2004. The jurisdiction of this Court is invoked under 28 USC sec 1254(1).

RELEVANT PROVISIONS

Louisiana Whistleblower's Act, R.S. 23:967

A. An employer shall not take any reprisal against an employee who in good faith, and after advising the employer of the violation of law:

(1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.

(2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into a violation of law.

(3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

B. An employee may commence a civil action in a district court where the violation occurred against any employer who engages is a practice prohibited by

Subsection A of this Section. If the court finds that the provisions of Subsection A have been violated, the plaintiff may recover from the employer damages, reasonable attorney fees, and court costs.

C. For the purposes of this Section, the following terms shall have the definitions ascribed below:

(1) "Reprisal" includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such.

(2) "Damages" include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal.

STATEMENT

Petitioner, a German citizen, alleged diversity jurisdiction (App. P. 1a) and sued under the Louisiana Whistleblower's Act, R.S. 23:967 for events which occurred outside of Louisiana in India, West Africa, or Dubai. (2a) Defendant moved to dismiss for lack of extraterritorial jurisdiction and on summary judgment grounds. The district court granted the motion for summary judgment and dismissed with prejudice. The Court of Appeals for the Fifth Circuit affirmed. This petition followed.

SUMMARY OF THE ARGUMENT

A federal court sitting in diversity jurisdiction sits as another court of the host state. If the state courts would not have jurisdiction, neither would the federal court. Because the Louisiana state courts did not have extraterritorial jurisdiction under the Louisiana Whistleblower's Act, R.S. 23:967, neither did the federal court.

When a court has no jurisdiction, it cannot reach the merits. Granting a motion for summary judgment reaches the merits. It was error for the Court to grant the motion for summary judgment and dismiss with prejudice.

REASONS FOR GRANTING THE WRIT

When a plaintiff sues in diversity under a state-created right the federal court is "only a another court of the State." *Guaranty Trust Co. of New York v. York*, 326 US 99, 108, 65 S.Ct. 1464, 1469 (1968). Because

plaintiff sued in diversity, the federal court sat only as another court of the state of Louisiana.

Louisiana courts have no Whistle Blower jurisdiction outside Louisiana

All cases interpreting the Whistleblower Act have held that it has no extraterritorial application and that therefore the federal court did not have jurisdiction over acts occurring outside the state of Louisiana. In *Salazar v Freeport Oversees Services Corporation*, 2000WL 1099391 (ED LA 2000), a citizen of New Mexico sued under the Act for incidents which occurred in Indonesia. The court held:

> The Court [does not] have jurisdiction because the Louisiana Whistle Blower Statute, La. R.S. 23:967 (B) mandates that a whistle blower may bring a claim in a district court where the violation occurred. The conduct at issue in this case occurred in Indonesia. Finally, the Court draws attention to the fact that the statute does not expressly provide for extraterritorial effect as the Supreme Court has required for years.

The Court of Appeals cited this same case for the same proposition, but continued on to address the merits. (App., p. 5a) A concurrent state supreme court case against the same defendant reached this same conclusion. *Mendonca v Tidewater, Inc.*, 862 So 2d 505, 509-510 (4th Cir 2003), *writ den.*, 2004 WL 940997.

Federal courts sitting in Louisiana have no Whistle Blower jurisdiction outside Louisiana

"[A] federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469 (1968); *see also*, *Angel v Bullington*, 330 U.S. 183, 187, 67 S.Ct. 657, 659(1947), citing *Guaranty Trust*; *Woods v Interstate Realty Co.*, 337 U.S. 348, 69 S.Ct. 1235, 1237(1949); *Teal Energy USA, Inc. v. GT, Inc.*, 2004 WL 1052984 *5(5th Cir May 11, 2004). Because a Louisiana court would not have jurisdiction under the Whistle Blower Act, a federal court sitting in Louisiana adjudicating a diversity case under the Whistle Blower Act also does not have jurisdiction.

If a court has no jurisdiction, it cannot grant a motion for summary judgment

A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction and should not adjudicate the merits of the claim. Since the granting of a motion for summary judgment is a disposition on the merits, it is error for a court which has no jurisdiction to grant summary judgment. Where the allegations do not survive a jurisdictional attack, the court has no jurisdiction to dispose of the case on the merits. *Stanley v CIA*, 639 F2d 1146, 1156-57 (5th Cir 1981)(want of subject matter jurisdiction); *Capitol Leasing Co., v. FDIC*, 999F2d 188, 191 (7th Cir 1993) citing *Shockley v Jones*, 823 F2d 1068, 1070 (7th Cir 1987)(...[I]f a court concludes that it has no jurisdiction, it must dismiss the case without reaching the merits.")

The federal court had no jurisdiction to grant a motion for the plaintiff; obviously, it had none to grant the motion for defendant.

It was error for a federal court, sitting as a court of the state of Louisiana and therefore without jurisdiction, to grant a motion for summary judgment.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 03-30785 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEERD GUENTHER,
Plaintiff-Appellant,

versus

TIDEWATER, INC.
Defendants-Appellee.

March 24, 2004, Filed

JUDGES: Before SMITH, DEMOSS, and STEWART, Circuit Judges.

OPINION: PER CURIAM: *

In this diversity case, Geerd Guenther ("Gunther") seeks modification of the district court's summary judgment dismissing with prejudice his Louisiana Whistleblower's Act claim for retaliation against Tidewater, Inc. ("Tidewater"). Guenther primarily contends that the district court dismissed the case for want of subject matter jurisdiction, which is not a judgment on the merits, and therefore the district court's judgment can have no effect as a dismissal with prejudice. Guenther, however, mistakenly confuses the district court's determination that he failed to establish a claim under Louisiana law with a lack of subject matter jurisdiction. Because we find that the district

court, which properly exercised diversity jurisdiction over the matter, did not err in determining that Guenther was not entitled to relief under the Whistleblower's Act as a matter of law, we affirm the district court's grant of summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 15, 2002, Guenther, a citizen of Lauda, Germany, brought this suit against Tidewater, a citizen of Delaware and Louisiana, under the Louisiana Whistleblower's Act, La. Rev. Stat. Ann. 23:967, asserting that Tidewater fired him in retaliation for his numerous complaints about business decisions made by Tidewater and his allegations that Tidewater had engaged in illegal activity. n1 Upon completion of discovery, Tidewater filed a motion for summary judgment in which it asserted that the Act does not have extraterritorial effect and thus does not apply to the events in this case, all of which occurred either in India, West Africa, or Dubai. Tidewater also argued that Guenther had no claim under the Act because (1) Guenther was not a Tidewater employee; (2) Tidewater did not violate Louisiana Law; and (3) Tidewater took no reprisals against him. In response, Guenther filed a three-line "Statement of No Opposition to Motion for Summary Judgment," stating that "Plaintiff concedes lack of jurisdiction. A dismissal without prejudice under FRCP Rule 41(b) is required." In its reply of July 15, 2003, Tidewater clarified its summary judgment arguments, explained that jurisdiction was not at issue, and argued that a Rule 41(b) dismissal without prejudice was not appropriate in this case. On July 17, 2003, Guenther filed a sur- reply in which he conceded that the Louisiana Whistleblower's Act did not apply

extraterritorially. Guenther also stated "Findings of fact are not necessary. Plaintiff's concession should end the matter as far as this court is concerned." On July 18, 2003, the district court issued an Order and Reasons granting Tidewater summary judgment and dismissing Guenther's suit with prejudice. Guenther now appeals.

DISCUSSION

Guenther argues that the district court erred in granting summary judgment, asserting that the basis for the dismissal was a want of subject matter jurisdiction, and that the district court therefore erred in proceeding to adjudicate the merits of the case. According to Guenther, the district court should have treated Tidewater's motion for summary judgment as a Rule 12(b)(1) motion and should have dismissed the case without prejudice under Rule 41(b). We disagree.

As a threshold matter, we note that the district court properly established that it had diversity jurisdiction over the case pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds $ 75,000, Guenther is a citizen of Germany, and Tidewater is a citizen of Delaware and Louisiana. Therefore, Guenther's assertion that the district court erred in refusing to convert Tidewater's summary judgment motion into a 12(b)(1) motion is without merit. Moreover, as the district court correctly pointed out, Rule 41(b) applies only to involuntary dismissals and thus has no application where, as here, the plaintiff has attempted to voluntarily dismiss his action.

Turning to the propriety of the district court's grant of summary judgment, we likewise find no error in the

district court's rulings. This Court reviews the grant of summary judgment de novo, applying the same legal standards as the district court applied to determine whether summary judgment was appropriate. Flock v. Scripto-Tokai Corp., 319 F.3d 231, 236 (5th Cir. 2003) (citing Ramirez v. City of San Antonio, 312 F.3d 178, 181 (5th Cir. 2002)). A summary judgment motion is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the record indicates that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). To determine "whether there is a dispute as to any material fact, we consider all of the evidence in the record, but we do not make credibility determinations or weigh evidence." Flock, 319 F.3d at 236 (citation omitted). Rather, "we draw all reasonable inferences in favor of the nonmoving party." Id.

After carefully considering the pleadings and the entirety of the record, we agree with the district court that Guenther utterly failed to adduce any evidence supporting his case and that he failed to demonstrate why summary judgment was inappropriate. Once Tidewater alerted the district court that there was an absence of evidence supporting one or more elements of Guenther's claim, the non-movant, Guenther, had the affirmative duty to come forward with evidence to rebut the summary judgment motion. Celotex, 477 U.S. at 325; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). At that point, the non-movant must go beyond the pleadings and designate specific facts showing that there is a

genuine issue of material fact for trial. Celotex, 477 U.S. at 325. As we have previously stated, "this burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam).

In this case, it was undisputed that all the events at issue took place in India, West Africa, or Dubai, and that the Louisiana Whistleblower's Act upon which Guenther's claim is based has no extraterritorial application. See Salazar v. Freeport Overseas Serv., 2000 U.S. Dist. LEXIS 11418, No. 99-1210, WL 1099391, at *2 (E.D. La. Aug. 3, 2000). In addition, Guenther did not dispute any of the material facts offered by Tidewater or offer any evidence in support of his claim. Specifically, Guenther provided no evidence that he was a Tidewater employee, that Tidewater violated Louisiana law, or that Tidewater took any reprisals against him. Therefore, we agree with the district court that Tidewater was entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of Tidewater and its dismissal of Guenther's Louisiana Whistleblower's Act claim with prejudice.

AFFIRMED.

FOOTNOTES

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

n1 Guenther voluntarily dismissed his claims that Tidewater discriminated against him on the basis of his age and/or national origin.

CIVIL ACTION
NO. 02-2491
SECTION "S" (2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GEERD GUNTHER

VERSUS

TIDEWATER, INC.

July 18th, 2003

ORDER AND REASONS

Defendant Tidewater, Inc. has filed a Motion for Summary Judgment (Document 12). IT IS ORDERED that Tidewater's Motion for Summary Judgment is GRANTED, and Gunther's suit is hereby DISMISSED WITH PREJUDICE.

Gunther has sued Tidewater under the Louisiana Whisteblower Act, LSA-R.S. 23:967, contending that Tidewater fired him after he complained about its alleged violations of law.[1] Tidewater's motion argues that the Act does not apply to the events of this case, all of which occurred in India, West Africa, or Dubai, and that Gunther has no claim under the Act because he was not a Tidewater employee, Tidewater did not violate Louisiana law, and Tidewater took no reprisals against him.

In response to Tidewater's motion, Gunther fled a "Statement of No Opposition" stating that "Plaintiff concedes lack of jurisdiction. A dismissal without prejudice under FRCP Rule 41 (b) is required." Tidewater's motion claims only that Gunther has no substantive claim under the statute governing his suit, and is not based on lack of subject matter jurisdiction. The court has subject matter jurisdiction over this case under 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000.00, Gunther is a citizen and subject of Germany, and Tidewater is a citizen of Delaware and Louisiana. [2] Gunther has provided no evidence demonstrating that subject matter jurisdiction does not exist. Additionally, Rule 41(b) on its face applies only to involuntary dismissals, not to a plaintiffs attempt to voluntarily dismiss an action. Voluntary dismissals are governed by Rule 41(a). Under Rule 41(a)(1), a party is entitled to a voluntary dismissal without order of court "before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . ." Rule 41(a)(2) provides that in all other circumstances, "an action shall not be dismissed at the plaintiffs instance save upon order of the court and upon such terms and conditions as the court deems proper." The court denies Gunther's request for an order of dismissal under Rule 41 (a)(2) in this case because the court has subject matter jurisdiction under 28 U.S.C. § 1332.

Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." See also Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."). Additionally, under Rule 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. LSA-R.S. 23.967 does not have extraterritorial effect, and does not apply to conduct occurring in India, West Africa, and Dubai. Salazar v. Freeport Overseas Service Co., No. 991210, 2000 WL 1099391, at *2 (E.D. La. Aug. 3, 2000). The court further finds Gunther has provided no evidence that he was a Tidewater, Inc. employee, that Tidewater violated Louisiana law, or that Tidewater took any reprisals against him. There is an absence of material evidence supporting Gunther's case, and Gunther has failed to demonstrate why summary judgment is inappropriate. See Stahl v. Novartis Pharmaceuticals Corp., 283 F.2d 254, 263 (5th Cir.) ("The moving party may meet its burden to demonstrate the absence of a genuine issue of material fact by pointing out that the record contains no

support for the non-moving party's claim. In this circumstance, if the non-moving party can point to nothing in the record supporting its claim, summary judgment is appropriate."), cert. denied, 123 S.Ct. 111, 154 L.Ed.2d 34 (2002).

Because the record reflects that Tidewater is entitled to judgment as a matter of law, the court grants Tidewater's motion.

New Orleans Louisiana this 18th day of July, 2003.
Mary Ann Vial Lemmon sited States District Judge

FOOTNOTES

[1] Counts II and III Gunther's suit alleged that Tidewater discriminated against him on the basis of his age and national origin. The court granted Gunther's unopposed motion to dismiss Counts II and III on February 27, 2003.

[2] See Gunther's "Complaint" at parapara 1-3 (setting forth diverse citizenship of the parties); id. at prayer (seeking back pay, fringe benefits, front pay, bonuses, emotional distress damages, punitive damages, and attorney's fees); Tidewater's "Answer and Affirmative Defenses" at parapara 1-2 (admitting citizenship allegations in the Complaint).

CIVIL ACTION
NO. 02-2491
SECTION "S" (2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GEERD GUNTHER

VERSUS

TIDEWATER, INC.

July 21th, 2003

JUDGMENT

Considering the written Order and Reasons of the court;

IT IS ORDERED, ADJUDGED, AND DECREED,n that there be judgment in favor of defendant Tidewater, Inc. and against plaintiff Geerd Gunther, dismissing plaintiff's complaint with prejudice.

New Orleans, Louisiana, this 21st day of July, 2003.

MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE